

John P. Kristensen (SBN 224132)  
 Jesenia A. Martinez (SBN 316969)  
 Jacob J. Ventura (SBN 315491)  
**KRISTENSEN LLP**  
 12540 Beatrice Street, Suite 200  
 Los Angeles, California 90066  
 Telephone: 310-507-7924  
 Facsimile: 310-507-7906  
 john@kristensenlaw.com  
 jesenia@kristensenlaw.com  
 jacob@kristensenlaw.com

*Attorneys for Plaintiff Lisa Friedman  
 and all others similarly situated*

**THE UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

LISA FRIEDMAN, individually and  
 on behalf of herself and all others  
 similarly situated,

Plaintiff,  
 vs.

JILLIAN MICHAELS, an individual;  
 EM DIGITAL, LLC, a Florida  
 Limited Liability Company;  
 EMPOWERED MEDIA, LLC, a  
 California Limited Liability  
 Company; and DOES 1–100,  
 inclusive,

Defendants.

) Case No.: 2:18-cv-09414-GW-SS

) **CLASS ACTION**

) **Assigned to Hon. George H. Wu**

) **PLAINTIFF LISA FRIEDMAN’S**

) **NOTICE OF MOTION AND**

) **MOTION FOR PRELIMINARY**

) **APPROVAL OF CLASS**

) **SETTLEMENT**

) Date: March 9, 2020

) Time: 8:30 a.m.

) Courtroom: 9D

) Complaint Filed: August 20, 2018

) Removed: November 5, 2018

) Notice of Settlement: December 2, 2019

**TO THIS HONORABLE COURT AND ALL PARTIES AND THEIR  
ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on March 9, 2020, at 8:30 a.m., in Courtroom 9D of the United States District Court for the Central District of California, located at 350 West First Street, Los Angeles, California 90012, plaintiff Lisa Friedman (“Plaintiff”), for herself and all other similarly situated, will move this Court for an order granting preliminary approval of the class action settlement as detailed in Plaintiff’s Memorandum of Points and Authorities.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the declaration and exhibits thereto, the pleadings, and all other papers on file in this action, and upon such other evidence and arguments as may be presented at the hearing on this matter.

Dated: February 7, 2020

Respectfully submitted,

By: /s/ John P. Kristensen

John P. Kristensen (SBN 224132)

*john@kristensenlaw.com*

Jesenia A. Martinez (SBN 316969)

*jesenia@kristensenlaw.com*

Jacob J. Ventura (SBN 315491)

**KRISTENSEN LLP**

*Attorneys for Plaintiff and all others  
similarly situated*

**CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3**

Plaintiff Lisa Friedman's counsel certifies that prior to the filing of the instant motion, all parties, through counsel, met and conferred pertaining to the subject matter of the instant motion on January 24, 2020. Defendants EM Digital, LLC, Empowered Media, LLC, and Jillian Michaels do not oppose this motion.

Dated: February 7, 2020

Respectfully submitted,

By: /s/ John P. Kristensen

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*john@kristensenlaw.com*

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**KRISTENSEN LLP**

*Attorneys for Plaintiff and all others  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Lisa Friedman (“Plaintiff”), individually and on behalf of the certified Class, hereby submits this motion for preliminary approval of a proposed settlement (“Settlement”) of this action (the “Litigation”). Defendants EM Digital, LLC, Empowered Media, LLC, and Jillian Michaels (collectively, “Defendants”) do not oppose Plaintiff’s motion. Plaintiff and Defendants shall collectively be referred to herein as the “Parties.” The terms of the Settlement are set forth in the Settlement Agreement and Release (the “Agreement”).<sup>1</sup> See Declaration of John P. Kristensen (“Kristensen Decl.”) ¶¶ 3, Exhibit (“Ex.”) A.

The Settlement resulted from the Parties’ extended arm’s-length settlement discussions. The Settlement provides for a substantial financial benefit to each Class Member (“Member”) as certified by the Court on October 23, 2019 [Dkt. 69]. See Kristensen Decl. ¶ 4. The Class consists of:

*All California consumers, who were first charged from January 1, 2017 to the present, whose credit cards or debit cards were automatically charged on a recurring basis as part of a subscription to the “My Fitness by Jillian Michaels” service.*<sup>2</sup>

The Settlement requires Class Notice provided to each Member via email and through a Settlement Website explaining key terms of the Settlement, including benefits under the Settlement and how to opt out of or object to the Settlement. See Kristensen Decl. ¶¶ 3, 6, Ex. 1 to Ex. A. The benefits for Members who do not opt out of the Settlement include the following: each Member may submit a claim form to obtain a minimum of \$30.00, if after all the Claim Forms

<sup>1</sup> Unless otherwise defined herein, capitalized terms used in this memorandum shall have the same meaning ascribed to them in the Agreement.

<sup>2</sup> The Class Period is from January 1, 2017 through the date that the Court grants preliminary approval of the Settlement.



are submitted and received by the Settlement Administrator, funds remain allocated to the Class, a pro rata portion of the funds remaining will be added to the \$30.00 for each Class Member such that every Class Member who submits a Claim Form will receive one check for at least \$30.00. Any unclaimed funds from the Settlement Fund after all Settlement Costs and Credit Payments are paid shall be distributed in a *cy pres* distribution to the National Consumer Law Center, subject to approval of the Court, such that the entire Settlement Fund shall be distributed following final approval of the Settlement after the Effective Date. The proposed Claim Form requires each Member to provide current contact and “My Fitness by Jillian Michaels” (“MJFM”) account information, a verification that the Member had purchased a subscription to MFJM service, and confirmation under penalty of perjury that the Member was at least 18 years old and a resident of California when the Member purchased the MFJM subscription. *See* Kristensen Decl. ¶¶ 3, 7, Ex. 2 to Ex. A.

The Settlement also provides that after the Effective Date, Defendants will continue to make recurring subscription language clear and conspicuous on the MFJM website and MFJM apps and a check box that requires users to confirm the terms of the subscription before the subscription is completed so as to continue to satisfy the requirements of California’s Automatic Renewal Law (“ARL”), Cal. *Bus. & Prof. Code* §§ 17600, *et seq.* *See* Kristensen Decl. ¶¶ 3, 8, Ex. A at ¶ 32.

With an estimated Class size of 4,023 Members, the Settlement has a monetary value of \$225,000.00 in monetary relief. *See* Kristensen Decl. ¶¶ 3, 9, Ex. A at ¶ 29. In addition to the monetary benefits achieved, Class Counsel estimates that the injunctive relief provided for the Class and the general public carries a value of at least \$100,000 such that Defendants’ revised language and procedures more substantially comply with the ARL such that consumers purchasing a subscription are afforded the notice and can provide affirmative consent pursuant to the ARL. Thus, the total settlement value is estimated at

1 \$325,000.00. *See* Kristensen Decl. ¶¶ 3, 10, Ex. A. at ¶ 32. Defendants have agreed  
2 to pay the costs of Notice and Settlement administration, and, subject to Court  
3 approval, a proposed Attorneys’ Fee Award of in the amount of \$56,250.00 to  
4 Class Counsel, a Class Representative Award of \$2,000.00 to Plaintiff, and a  
5 reasonable Cost Reimbursement from the \$225,000.00 comprising the Settlement  
6 Fund with no additional funds provided. *See* Kristensen Decl. ¶¶ 3, 11, Ex. A. at ¶¶  
7 47-51.

8 While Plaintiff is confident of a favorable determination of the merits, she  
9 had determined that the Settlement provides significant benefits to the Class and is  
10 in the best interests of the Class. Plaintiff also believes that the Settlement is  
11 appropriate because Plaintiff recognizes the expense and amount of time required  
12 to continue to pursue the Litigation, as well as the uncertainty, risks, and  
13 difficulties of proof inherent in prosecuting such claims. Similarly, as evidenced by  
14 the Agreement, Defendants believe that they have substantial and meritorious  
15 defenses to all of Plaintiff’s assertions and claims, but have determined that it is  
16 desirable to settle the Litigation on the terms set forth in the Agreement. *See*  
17 Kristensen Decl. ¶ 12.

18 Plaintiff believes that the Settlement satisfies all of the criteria for  
19 preliminary approval. Accordingly, Plaintiff moves this Court for an order  
20 preliminarily approving the Settlement, directing dissemination of Class Notice,  
21 and scheduling a Final Approval hearing. *See* Kristensen Decl. ¶ 13.

## 22 **II. STATEMENT OF FACTS**

### 23 **A. *Factual Background***

24 Defendants’ “My Fitness by Jillian Michaels” (“MFJM”) service was  
25 launched on January 1, 2017. Defendants offered three types of subscriptions for  
26 the “MFJM” service: monthly, quarterly, or yearly. A seven-day free trial is  
27 offered to consumers before Defendants charge based on the subscription plan  
28 chosen by a consumer. *See* Kristensen Decl. ¶ 14.

1 The language for the website page and the app front page identify the three  
2 types of subscription.<sup>3</sup> Plaintiff alleged in her initial Complaint and First Amended  
3 Complaint, however, that the language referring to the recurring nature of the  
4 charges for subscription and the price referenced were not for a finite term was in a  
5 substantially smaller font size, in light gray at the bottom of the page. For every  
6 recurring subscription chosen by a consumer, the consumer's payment method is  
7 charged at the time the subscription is initially purchased and thereafter, for  
8 ensuing consecutive months corresponding on the subscription cycle chosen by the  
9 consumer automatically as part of the recurring subscription. *Id.*

10 ***B. Procedural Posture***

11 On September 20, 2018, Plaintiff filed an action, for herself and other  
12 similar situated, against Defendants, contending that, *inter alia*, Defendants  
13 violated the ARL when California residents registered and first paid for a  
14 subscription to the MFJM service [Dkt. 1-1]. Defendants removed the matter on  
15 November 5, 2018, to the United States District Court for the Central District of  
16 California [Dkt. 1]. *See* Kristensen Decl. ¶ 15.

17 After filing their Answer on November 12, 2019 [Dkt. 11], Defendants filed  
18 a Motion for Judgment on the Pleadings on March 8, 2019[Dkt. 16]. The Court  
19 denied in part, and granted in part, the motion finding no private right of action  
20 under the ARL, but that it could be a predicate claim for the Unfair Competition  
21 Law ("UCL"), Cal. *Bus. & Prof. Code* §§ 17200, *et seq.*, Consumer Legal  
22 Remedies Act ("CLRA"), Cal. *Civ. Code* §§ 1750, *et seq.*, and False Advertising  
23 Law ("FAL"), Cal. *Bus. & Prof. Code* §§ 17500, *et seq.* claims. Plaintiff was  
24 granted leave to amend those claims [Dkt. 19]. *See* Kristensen Decl. ¶ 16.

25 ///

26  
27 <sup>3</sup> Since MFJM's launch several different promotions, subscription terms, and  
28 charges have been offered. The general subscription terms and offerings are as  
described.

On May 16, 2019, Plaintiff filed the operative First Amended Complaint [Dkt. 22]. On August 2, 2019, Plaintiff filed her Motion for Class Certification and sought a class of California residents as follows:

*All California consumers, who were first charged from January 1, 2017 to the present, whose credit cards or debit cards were automatically charged on a recurring basis as part of a subscription to the “My Fitness by Jillian Michaels” service.*

On October 23, 2019, the Court issued its Order [Dkt. 69] adopting its tentative decision of October 10, 2019 [Dkt. 67] granting the Motion for Class Certification. *See* Kristensen Decl. ¶ 17.

On September 5, 2019, Defendants filed their Motion for Summary Judgment [Dkt. 39], which Plaintiff opposed on September 26, 2019 [Dkt. 57]. On October 24, 2019, after oral argument was heard, the Court ordered further briefing by the Parties on a number of issues raised in Defendants’ Motion for Summary Judgment [Dkt. 75]. The Parties fully briefed the issues on November 4 and November 12, 2019 [Dkt. 76-79]. On December 2, 2019, Plaintiff filed a Notice of Settlement after an agreement was reached between the Parties [Dkt. 80]. At the time the Notice of Settlement was filed, the Court had not issued a ruling on Defendants’ Motion for Summary Judgment. *See* Kristensen Decl. ¶ 18.

### **III. THE SETTLEMENT**

#### **A. Settlement Benefits**

Under the Settlement, Defendants agree to a multifaceted Settlement structure, which includes a cash payout to Class Members who timely submit valid claims, a *cy pres* award if funds remain to the National Consumer Law Center, and an agreement to continue engaging in business practices which align with the ARL’s requirements regarding adequate notice to consumers and receipt of affirmative consent. From the Settlement Fund with no additional funds provided, Defendants will pay for attorneys’ fees, costs, Settlement administration expenses,

1 and the Incentive Award to Plaintiff, subject to Court approval. These benefits are  
2 significant, tangible, and offer fair remuneration for the Class. *See* Kristensen  
3 Decl. ¶ 19.

4 Pursuant to the Agreement, Class Notice will be sent via email to the  
5 approximately 4,023 Members. *See* Kristensen Decl. ¶¶ 3, 20, Ex. A. at ¶ 7 & Ex.  
6 1. The Class Notice will also be posted on the Settlement Website. *Id.* Before Class  
7 Notice is provided, the Settlement Administrator will develop the Settlement  
8 Website, which shall contain relevant documents pertaining to the Settlement  
9 including the Settlement Agreement, the Claim Form, the Class Notice, and the  
10 Preliminary Approval Order. *See* Kristensen Decl. ¶¶ 3, 20, Ex. A at ¶ 30. The  
11 Class Notice will explain that each Member may submit a claim to obtain a  
12 minimum of \$30.00, that if funds remain, an additional proportionate amount will  
13 be added for all Members who timely submitted a claim for a pro rata basis.  
14 Further, the Class Notice will explain that if funds remain, the remaining funds  
15 will be a *cy pres* award to the National Consumer Law Center. *See* Kristensen  
16 Decl. ¶¶ 3, 20, Ex. 1. In addition to the foregoing monetary relief, Defendants have  
17 agreed to continue to take affirmative steps to provide disclosure in clear and  
18 conspicuous language of MFJM's service for recurring charges pursuant to the  
19 ARL. *See* Kristensen Decl. ¶¶ 3, 20, Ex. A. at ¶ 32.

20 From the Settlement Fund, Defendants have agreed to retain a Settlement  
21 Administrator and to pay for any and all costs associated with administering the  
22 Settlement, including Class Notice, handling of claims and the distribution of  
23 monetary payments to Members, and developing and maintaining the Settlement  
24 Website as well as the \$2,000 Incentive Payment to Plaintiff and the proposed  
25 Attorneys' Fee Award plus reasonable Cost Reimbursement to Class Counsel,  
26 pending approval by the Court. *See* Kristensen Decl. ¶¶ 3, 21, Ex. A. at ¶ 29.

27 ///

28 ///

**B. Scope of Release**

The Agreement provides that Members who do not request exclusion from the Settlement will release any and all claims, known or unknown, against the Releasees based in any manner on the allegations regarding unfair business or trade practices, any violation of the ARL, any violation of the UCL predicated on violations of the ARL, any violation of the CLRA predicated on violations of the ARL, any violation of the FAL predicated on violations of the ARL for the MFJM service arising during the Class Period. *See* Kristensen Decl. ¶¶ 3, 22, Ex. A. at ¶ 24.

**C. Opportunity to Opt Out and Object**

Under the terms of the proposed Settlement, Members will have the right to opt out of the Settlement or object to its terms. A Member who wishes to opt out of the Settlement must, no later than 30 days after the Class Notice Date, submit an opt-out request via the method provided for in the Class Notice. *See* Kristensen Decl. ¶¶ 3, 23, Ex. A. at ¶ 45. A Class Member who does not opt out and who wishes to object to the Settlement may do so by filing with the Court and mailing to counsel for the Parties, no later than 30 days after the Class Notice Date, a notice of objection and/or request to be heard at the Final Approval Hearing. *See* Kristensen Decl. ¶¶ 3, 23, Ex. A. at ¶ 53, subsection M. Any such notice must include the case name and number, the Member's name and contact information and the email address associated with the Member's MFJM's account, a statement of all grounds and legal support for the objection and copies of any supporting documentation, a list of other cases in which the Member has objected to a class action settlement, and an affirmation under penalty of perjury that the Member had purchased a subscription to MFJM service during the Class Period while at least 18 years old and a resident of California. *Id.*

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///



**D. Class Representative's Application for Incentive Award**

The Settlement contemplates that Class Counsel will request an Incentive Award in the amount of \$2,000.00 to be distributed to the Class Representative, subject to Court approval. Defendants have agreed not to oppose this request. *See* Kristensen Decl. ¶¶ 3, 24, Ex. A. at ¶¶ 48-49.

**E. Class Counsel's Application for Fees, Costs, and Expenses**

The Settlement contemplates that Class Counsel may apply to the Court for an award of attorneys' fees in the amount of \$56,250.00 representing 25% of the total estimated monetary value of the Settlement consisting of monetary relief to the Class. Class Counsel Defendants have agreed not to oppose an application by Class Counsel for an award of attorneys' fees as long as it does not exceed this stated amount for attorneys' fees and amount of reasonable expenses and costs. *See* Kristensen Decl. ¶¶ 3, 25, Ex. A. at ¶¶ 48-49.

**IV. ARGUMENT**

**A. Standard for Preliminary Approval of Class Action Settlement**

A class action may not be dismissed, compromised, or settled without the approval of the Court. Fed. R. Civ. P. 23(e). Judicial proceedings under Rule 23 have led to a defined procedure and specific criteria for settlement approval in class action settlements, described in the *Manual for Complex Litigation* (Fourth) (Fed. Judicial Center 2004) ("*Manual*") § 21.63, *et seq.*, including preliminary approval, dissemination of notice to class members, and a fairness hearing. *Manual*, §§ 21.632, 21.633, 21.634. The purpose of the Court's preliminary evaluation of the settlement is to determine whether it is within the "range of reasonableness," and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. *See* 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.25 *et seq.*, and § 13.64 (4th ed. 2002 and Supp. 2004) ("*Newberg*"). The Court is not required to undertake an in-depth consideration of the relevant factors for final approval.



1 Instead, the “judge must make a preliminary determination on the fairness,  
2 reasonableness, and adequacy of the settlement terms and must direct the  
3 preparation of notice of the certification, proposed settlement, and date of the final  
4 fairness hearing.” *Manual*, § 21.632 (4th ed. 2004).

5 As a matter of public policy, settlement is a strongly favored method for  
6 resolving disputes. *See Utility Reform Project v. Bonneville Power Admin.*, 869  
7 F.2d 437, 443 (9th Cir. 1989). This is especially true in class actions such as this.  
8 *See Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615 (9th Cir. 1982). As  
9 a result, courts should exercise their discretion to approve settlements “in  
10 recognition of the policy encouraging settlement of disputed claims.” *In re*  
11 *Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y.  
12 1995). To make the preliminary fairness determination, courts may consider  
13 several relevant factors, including “the strength of the plaintiff’s case; the risk,  
14 expense, complexity, and likely duration of further litigation; the risk of  
15 maintaining class action status through trial; the amount offered in settlement; the  
16 extent of discovery completed and the stage of the proceedings; [and] the  
17 experience and views of counsel . . . .” *See Hanlon v. Chrysler Corp.*, 150 F.3d  
18 1011, 1026 (9th Cir. 1998). Furthermore, courts must give “proper deference to the  
19 private consensual decision of the parties,” since “the court’s intrusion upon what  
20 is otherwise a private consensual agreement negotiated between the parties to a  
21 lawsuit must be limited to the extent necessary to reach a reasoned judgment that  
22 the agreement is not the product of fraud or overreaching by, or collusion between,  
23 the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable  
24 and adequate to all concerned.” *Id.* at 1027.

25 Preliminary approval does not require the Court to make a final  
26 determination that the settlement is fair, reasonable, and adequate. Rather, that  
27 decision is made only at the final approval stage, after notice of the settlement has  
28 been given to the class members and they have had an opportunity to voice their

1 views of the settlement or to exclude themselves from the settlement. *See* 5 James  
2 Wm. Moore, *Moore's Federal Practice – Civil* § 23.165[3] (3d ed.) Thus, in  
3 considering a potential settlement, the Court need not reach any ultimate  
4 conclusions on the issues of fact and law which underlie the merits of the dispute,  
5 *West Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), and need not  
6 engage in a trial on the merits, *Officers for Justice v. Civil Service Comm'n*, 688  
7 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so that  
8 “the proposed settlement . . . may be submitted to members of the prospective class  
9 for their acceptance or rejection.” *Philadelphia Hous. Auth. v. Am. Radiator &*  
10 *Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

11 Preliminary approval of the settlement should be granted if, as here, there  
12 are no “reservations about the settlement, such as unduly preferential treatment of  
13 class representatives or segments of the class, inadequate compensation or harms  
14 to the classes, the need for subclasses, or excessive compensation for attorneys.”  
15 *Manual for Complex Litigation* § 21.632, at 321 (4th ed. 2004). Furthermore, the  
16 opinion of experienced counsel supporting the settlement is entitled to  
17 considerable weight. *See., e.g., Kirkorian v. Borelli*, 695 F.Supp. 446 (N.D.  
18 Cal.1988) (opinion of experienced counsel carries significant weight in the court’s  
19 determination of the reasonableness of the settlement); *Boyd v. Bechtel Corp.*, 485  
20 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of plaintiffs’ counsel should  
21 be given a presumption of reasonableness).

22 The decision to approve or reject a proposed settlement “is committed to the  
23 sound discretion of the trial judge[.]” *See Hanlon*, 150 F.3d at 1026. This  
24 discretion is to be exercised “in light of the strong judicial policy that favors  
25 settlements, particularly where complex class action litigation is concerned,”  
26 which minimizes substantial litigation expenses for both sides and conserves  
27 judicial resources. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th  
28 Cir. 1998) (quotations omitted). Based on these standards, Plaintiff respectfully

1 submits that, for the reasons detailed below, the Court should preliminarily  
2 approve the proposed Settlement as fair, reasonable and adequate. *See* Kristensen  
3 Decl. ¶ 26.

4 **1. Liability Is Highly Contested and Both Sides Face**  
5 **Significant Challenges in Litigating This Case**

6 Defendants have vigorously contested the claims asserted by Plaintiff in this  
7 Litigation given the extensive motion practice by both sides. While both sides  
8 strongly believe in the merits of their respective cases, there are inherent risks to  
9 both sides in continuing the Litigation. In considering the Settlement, Plaintiff and  
10 Class Counsel carefully balanced the risks of continuing to engage in protracted  
11 and contentious litigation, against the benefits to the Class. As a result, Class  
12 Counsel supports the Settlement and seek its Preliminary Approval. *See* Kristensen  
13 Decl. ¶ 27.

14 Similarly, Defendants believe that they have strong and meritorious defenses  
15 not only in the Litigation as a whole, but also as to the amount of damages sought.  
16 However, Defendants recognize that there are inherent risks and costs associated  
17 with protracted litigation. The negotiated Settlement reflects a compromise  
18 between Defendants in avoiding the risks and costs associated with protracted  
19 litigation and Class Counsel and the risk that the Class might not recover. Because  
20 of the costs, risks to both sides, and delays of continued litigation, the Settlement  
21 presents a fair and reasonable alternative to continuing to pursue the Litigation. *See*  
22 Kristensen Decl. ¶ 28.

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**2. Defendants' Agreement to Provide Cash Payments to Class Members and Injunctive Relief, Provides a Fair and Substantial Benefit to the Class**

As set forth above, Defendants have agreed to pay \$225,000.00 to fund the settlement, which includes Notice and Settlement Administration Costs<sup>4</sup>, creating and maintaining a Settlement Website, providing Class Notice, an Incentive Award of no more than \$2,000.00 to Plaintiff and attorneys' fees of \$56,250.00 plus reimbursement of reasonable costs. *See* Kristensen Decl. ¶ 29.

Class Members will need to submit Claim Forms so that the monetary benefits can be provided to them as no mailing addresses are provided to open or maintain a MFJM account. Furthermore, based on the Class information provided by Defendants, a significant portion of the Class signed up for the MFJM service via the Apple iOS app store or Google Play store such that contact information, besides email addresses, are held by these third parties. Claim Forms can be submitted by Class Members by either mailing them to the Settlement Administrator or directly through the Settlement Website. *See* Kristensen Decl. ¶ 30.

As a result, it is anticipated that the vast majority of the Settlement will provide direct and meaningful benefits to the Settlement Class. *See Shames v. Hertz Corp.*, Case No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at \*13 (S.D. Cal. Nov. 5, 2012) (settlement was fair where the parties "negotiated a settlement that provide[d] direct payment to class members"); *Hopson v. Hanesbrands Inc.*, Case No. CV-08-0844 EDL, 2009 WL 928133, at \*11 (N.D. Cal. Apr. 3, 2009) ("the benefits can be accurately traced because they are monetary payments directly to Class Members"). *See* Kristensen Decl. ¶ 31.

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<sup>4</sup> The approximate cost of Settlement Administration is around \$25,000.00. *See* Kristensen Decl. ¶ 29.

1 This Settlement intentionally avoids providing significant benefits to a *cy*  
2 *pres* recipient at the expense of the class. See *Dennis v. Kellogg Co.*, 697 F.3d 858,  
3 862-63 (9th Cir. 2012) (the amount of a *cy pres* award “must be examined with  
4 great care to eliminate the possibility that it serves only the ‘self-interests’ of the  
5 attorneys and the parties, and not the class”); *Lane v. Facebook, Inc.*, 709 F.3d  
6 791, 793 (9th Cir. 2013) (“We require district judges to be reasonably certain that  
7 class members will benefit before approving a *cy pres* settlement.”); *In re*  
8 *EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1049 (S.D. Cal. 2013).<sup>5</sup>

9 The settlement award that each Settlement Class Member will receive is fair,  
10 appropriate, and reasonable given the purposes of the ARL, UCL, FAL, and  
11 CLRA, and in light of light of the anticipated risk, expense, and uncertainty of  
12 continued litigation. It is well-settled that a proposed settlement may be acceptable  
13 even though it amounts to a percentage of the potential recovery that might be  
14 available to the class members at trial. See *e.g.*, *National Rural Tele. Coop. v.*  
15 *DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“well settled law that a  
16 proposed settlement may be acceptable even though it amounts to only a fraction  
17 of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.*, 225  
18 F.R.D. 436, 460 (E.D. Pa. 2000) (“the fact that a proposed settlement constitutes a  
19 relatively small percentage of the most optimistic estimate does not, in itself,  
20 weigh against the settlement; rather, the percentage should be considered in light  
21 of the strength of the claims”); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036  
22 (N.D. Cal. Jan. 9, 2008) (court-approved settlement amount that was small fraction  
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24 <sup>5</sup> Courts favor direct payment to class members over *cy pres* distributions. See  
25 *Molski v. Gleich*, 318 F.3d 937, 954-955 (9th Cir. 2003) *overruled on other*  
26 *grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (*cy*  
27 *pres* provision is a disfavored substitute for distribution of benefits directly to  
28 class members); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)  
([T]he *cy pres* doctrine—unbridled by a driving nexus between the plaintiff  
class and the *cy pres* beneficiaries—poses many nascent dangers to the fairness  
of the distribution process.”).



1 of the maximum potential recovery); *In re Mego Fin'l Corp. Sec. Litig.*, 213 F. 3d  
2 454, 459 (9th Cir. 2000). *See* Kristensen Decl. ¶ 31.

3 Thus, the Settlement provides substantial benefit to the Class Members, as  
4 they will receive meaningful monetary recovery with no undue burden and no  
5 expense.

6 **3. The Settlement Was Reached As the Result of Arms-Length**  
7 **Negotiation, Without Collusion**

8 The Settlement is the result of intensive arms'-length negotiation. Working  
9 independently of the Court, the Parties were able to reach a proposed resolution of  
10 this case. Class Counsel is satisfied that the information provided about the number  
11 of Class Members is accurate. The time and effort spent examining and  
12 investigating the claims militate in favor of preliminary approval of the proposed  
13 Settlement, as the process strongly indicates that there was no collusion. *See In re*  
14 *Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008)  
15 ("Settlements that follow sufficient discovery and genuine arms-length negotiation  
16 are presumed fair."). *See* Kristensen Decl. ¶ 32.

17 **4. Experienced Counsel Have Determined That the Settlement**  
18 **Is Appropriate and Fair to the Class**

19 Plaintiff is represented by counsel experienced in complex class action  
20 litigation. Class Counsel has extensive experience in class actions, as well as  
21 particular expertise in class actions relating to consumer protection. Class Counsel  
22 believes that the Settlement is fair, reasonable, and adequate. Their opinions  
23 should be given deference by the Court. *See* Kristensen Decl. ¶¶ 41-58.

24 **B. The Proposed Method of Class Notice Is Appropriate**

25 Rule 23(c)(2)(B) provides that, in any case certified under Rule 23 (b)(3),  
26 the court must order the "best notice practicable" under the circumstances. Rule 23  
27 (c)(2)(B) does not require "actual notice" or that a notice be "actually received."  
28 *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice need only be given in

1 a manner “reasonably calculated, under all the circumstances, to apprise interested  
2 parties of the pendency of the action and afford them an opportunity to present  
3 their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,  
4 314 (1950). “Adequate notice is critical to court approval of a class settlement  
5 under Rule 23 (e).” *Hanlon*, 150 F.3d at 1025.

6 Pursuant to Fed. R. Civ. P. 23 (e)(1)(B), “[t]he court must direct notice in a  
7 reasonable manner to all class members who would be bound by the proposal.”  
8 Rule 23 (c)(2)(B) also sets forth requirements as to the content of the notice. The  
9 notice must concisely and clearly state in plain, easily understood language: (i) the  
10 nature of the action; (ii) the definition of the class; (iii) the class claims, issues, or  
11 defenses; (iv) that a class member may enter an appearance through counsel if the  
12 member so desires; (v) that the court will exclude from the class any member who  
13 requests exclusion, stating when and how members may elect to be excluded; (vi)  
14 the time and manner for requesting exclusion; and (vii) the binding effect of a class  
15 judgment on class members under Rule 23(c)(3) . Fed. R. Civ. P. 23 (c)(2)(B).

16 The Settlement Administrator shall disseminate or arrange for the  
17 dissemination of Class Notice sent via email and via the Settlement Notice, is in a  
18 form materially consistent with Exhibit 1 to the Agreement. The Class Notice here  
19 satisfies each of the requirements of Rule 23(c)(2)(B) above. Further, direct notice  
20 has been held to be adequate notice to a Settlement Class. *See Schaffer v. Litton*  
21 *Loan Servicing, LP*, CV 05-07673 MMM JCX, 2012 WL 10274679, at \*8 (C.D.  
22 Cal. Nov. 13, 2012) (approving notice plan where class members were sent direct  
23 notice informing them and directing them to a settlement website); *Lo v. Oxnard*  
24 *European Motors, LLC*, 11CV1009 JLS MDD, 2012 WL 1932283, at \*1 (S.D.  
25 Cal. May 29, 2012) (final approval of class settlement using direct notice and  
26 settlement website). *See* Kristensen Decl. ¶ 33.

27 Defendants possess email addresses for all of the Class Members, regardless  
28 of whether Class Members signed up via the MFJM website or through Apple or



1 Google apps. The email addresses provided by the Class Members to the  
2 Defendants were required for use of the MFJM account, using the MFJM service,  
3 and is where Defendants communicate with users of the MFJM service by  
4 reminding them of upcoming renewal periods, payment confirmation emails at the  
5 end of every renewal period, and the sign up confirmation emails. Defendants do  
6 not possess physical addresses or landline phone numbers any of the Class  
7 Members as they are not required or necessary to sign up for or maintain a MFJM  
8 account. The Settlement Administrator will be able to send emails directly to each  
9 of the Class Members at the address that they recently used in conjunction with  
10 their MFJM account.<sup>6</sup> See Kristensen Decl. ¶ 34.

11 Further notice will be provided through the Settlement Website, which will  
12 be accessible by the time of the email Class Notice and will post, among other  
13 documents, the Agreement, a copy of the Notice, and the Preliminary Approval  
14 Order. Thus, through email Class Notice and the Settlement Website, Members  
15 will have ample notice of the Settlement and its terms, and they will have 30 days  
16 from the time of Class Notice to opt out of or object to the Settlement. *Cf. Torrissi*  
17 *v. Tucson Electric Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993) (31 days is  
18 more than sufficient, as Class as a whole had notice adequate to flush out whatever  
19 objections might reasonably be related to the settlement) *citing Marshall v.*  
20 *Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (approving timing of  
21 notice which was mailed 26 days before the deadline for opting out of the  
22

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23 <sup>6</sup> The Parties discussed, at Class Counsel's suggestions, to subpoena Apple or  
24 Google of Class Member mailing addresses, to the extent provided to Apple or  
25 Google. Ultimately, given the expected delay, additional expense that would  
26 come from the Settlement Fund, and inability to confirm that Apple or Google  
27 would have mailing addresses for the Class Members who signed up for the  
28 MFJM service via the Apple or Google apps, that direct notice via email was  
best practicable. In addition, Class Counsel suggested that the MFJM website  
and apps run targeted ads in California linking to the Settlement Website or  
otherwise advising of the Settlement, but this was not agreed to by Defendants.

1 settlement). Further, the Settlement Website shall be maintained and accessible to  
2 Settlement Class Members during this time and through the conclusion of the  
3 settlement proceedings in this case. *See* Kristensen Decl. ¶ 35.

4 This notice program was designed to meaningfully reach the largest number  
5 of Settlement Class Members possible by direct notice. In this age, email is often  
6 the best way to reach people, and is certainly the most cost-effective manner of  
7 direct notice in the case at bar, given Defendants' data constraints. Such direct  
8 notice is likely to be very successful in reaching the Settlement Class, and it is also  
9 the best practical notice under the circumstances since mostly email addresses are  
10 known and must be used by each Class Member when utilizing the MFJM service.  
11 By emailing the Class Notice and making the Class Notice available on the  
12 Settlement Website, the notice plan satisfies the requirements of due process and  
13 constitutes the best notice practicable under the circumstances. *See* Kristensen  
14 Decl. ¶ 36.

15 Recently, the Ninth Circuit in *Roes, 1-2 v. SFBSC Management, LLC*, 944  
16 F.3d 1035 (9th Cir. 2019) held that notice by mail when at least 12% of the mailed  
17 notices "were ultimately determined to be undeliverable" fell short of the Rule  
18 23(c)(2)(B) standard for best notice practicable under the circumstances of a Fair  
19 Labor Standards Act settlement pertaining to exotic dancers with unreliable  
20 contact information. *Id.* at 1046. Here, the Parties discussed how best to provide  
21 notice to the Class that would reach the greatest number of Class Members. Given  
22 that MFJM users use the service either through the MFJM website or through an  
23 app on their phones or iPads, that the email addresses are required to sign up and  
24 maintain an email to the MFJM service, and that regular correspondence and  
25 communication is completed by Defendants through the MFJM service via email,  
26 that emailing the Notice would be the best method, when coupled with the  
27 Settlement Website posting. Class Members are required to provide an email  
28 address to Defendants before their MFJM account is deemed completed, and is

1 most reasonable when Class Members have already received communications  
2 regarding their MFJM account exclusively through email correspondence. *See*  
3 Kristensen Decl. ¶ 37.

4 The Settlement Administrator shall prepare and file a declaration prior to the  
5 Final Approval Hearing certifying that the notice program has been properly  
6 administered in accordance with this Agreement, this Court's Orders, and as  
7 described herein. *See* Kristensen Decl. ¶ 38.

8 ***C. The Court Should Appoint KCC as the Settlement Administrator***

9 Plaintiff proposes that the Court appoint Kurtzman Carson Consultants, LLC  
10 ("KCC") to serve as the Settlement Administrator. KCC specializes in providing  
11 administrative services in class action litigation, and has extensive experience in  
12 administering consumer protection and privacy class action settlements.  
13 Defendants do not oppose this request. *See* Kristensen Decl. ¶ 39.

14 ***D. A Final Approval Hearing Should Be Scheduled***

15 The last step in the settlement approval process is the formal fairness or  
16 Final Approval Hearing, at which time the Court will hear all evidence and  
17 argument, for and against, the proposed Settlement. Plaintiff requests that the  
18 Court grant preliminary approval of the Settlement and schedule a Final Approval  
19 Hearing to be held not before 70 days after the date of entry of the Preliminary  
20 Approval Order, in order to allow sufficient time for developing the Settlement  
21 Website and providing Class Notice, and to allow Class Members time submit  
22 exclusion requests and objections. *See* Kristensen Decl. ¶ 40.

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**V. CONCLUSION**

For all the foregoing reasons, Plaintiff respectfully requests that the Court enter an order preliminarily approving the settlement.

Dated: February 7, 2020

Respectfully submitted,

By: /s/ John P. Kristensen

John P. Kristensen (SBN 224132)

*john@kristensenlaw.com*

Jesenia A. Martinez (SBN 316969)

*jesenia@kristensenlaw.com*

Jacob J. Ventura (SBN 315491)

**KRISTENSEN LLP**

*Attorneys for Plaintiff and all others  
similarly situated*

**CERTIFICATE OF SERVICE**

I certify that on Friday, February 07, 2020, a true and correct copy of **JOINT PLAINTIFF LISA FRIEDMAN'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT** and accompanying document were served electronically via ECF on each participant of record, including the participants listed below.

Richard S. Busch

[rbusch@kingballow.com](mailto:rbusch@kingballow.com)

Paul H Duvall

[pduvall@kingballow.com](mailto:pduvall@kingballow.com)

Brittney R. Dobbins

[bdobbins@kingballow.com](mailto:bdobbins@kingballow.com)

Benjamin P. Lemly

[blemly@kingballow.com](mailto:blemly@kingballow.com)

D. Keith Kelly, II

[kkelly@kingballow.com](mailto:kkelly@kingballow.com)

Kyle Watlington

[kwatlington@kingballow.com](mailto:kwatlington@kingballow.com)

*Law Offices of King and Ballow*

1999 Avenue of the Stars, Suite 1100

Los Angeles, CA 90067

**Counsel for Defendants**

**EM Digital, LLC, Empowered Media,  
LLC, and Jillian Michaels**

*/s/ John P. Kristensen*

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John P. Kristensen